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No. 85-534

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

RICHARD E. WILMSHURST and 49ER CHEVROLET,
Appellants,

VS.

NEW MOTOR VEHICLE BOARD, et al.,
Appellees.

On Appeal from the
Court of Appeal of the State of California,
Third Appellate District

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

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U.S. Constitution:
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BRIEF IN OPPOSITION TO MOTION TO DISMISS

INTRODUCTION

Appellants, Richard E. Wilmshurst and 49er Chevrolet (49er), hereby submit their brief in opposition to the motion to dismiss filed by the Chevrolet Motor Division, General Motors Corporation (GM), which was adopted by the Attorney General of the State of California by letter to the Clerk of this Court.

GM dealers have long operated under the ruthless policies of General Motors with the fear of franchise termination the means of control. The first time GM's activities were brought to public light, and the dealer's subservient position vindicated, was in a criminal trial in Indiana where GM was found guilty of criminal conduct.[1] If a dealer speaks out about GM's policies that may be

[1] The record of the first New Motor Vehicle Board (Board) hearing reflects horror stories similar to those in the government's case in *United States v. General Motors Corporation, et al.* (1941) 121 F.2d 376. In

wrongful or illegal he takes the chance of destroying the relationship through what GM terms "destructive conduct." GM requires that a GM dealer unequivocally follow its policies right or wrong, or be subject to franchise cancellation.

Thirty-nine years later, this Court reflected on the dominant position of the automobile manufacturer and the arbitrary rules, established by the manufacturer, by which the parties must do business in *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96, 101.[2]

The basis of our freedom of speech is the right to address government with wrongs that are taking place within our society. The manner in which consumer warranty is handled is of great public and governmental interest. Information on whether price-fixing is illegal or produces an unfair burden on the dealer and, indirectly affects every GM car owner adversely, should be free to flow between dealer and consumer groups, government and GM employees responsible for the application of the illegal or unfair policies without fear of franchise loss.

GM dealers throughout the United States dare not speak out to the press or government against the policies of GM without the fear of the destruction of their dealerships through franchise termination.

The right of this group of businessmen to be able to speak freely about policies of GM that may adversely affect not only each dealer but the general public is of national importance.

U.S. v. GM, Chevrolet's policy in Southern California was to force dealers to adhere to GM's policies or it would get another dealer. (P.392-393) The court found that GM felt the dissenting dealers "disrupted" the relationship as Chevrolet argues in this proceeding.

[2] In *Fox*, this Court cited excerpts from the 1956 Congressional Committee Report relating to the domination of the dealer by the manufacturer and, in actuality, its economic captive. The automobile manufacturer has a poor record for being fair with its dealer, for by 1978, the Federal government and 25 states enacted legislation to protect dealers from the oppressive and abusive acts of the automobile manufacturer.

The federal question in this proceeding affects every franchisor and franchisee within the United States and should be fully briefed and argued so that this Court may establish a guideline for the protection of financially-dominated franchisees who exercise their First Amendment rights.

ARGUMENT

I

THIS COURT MAY REVIEW THIS PROCEEDING UNDER ITS APPELLATE JURISDICTION

This Court may review this proceeding under its appellate jurisdiction by way of the "good cause" standard concerning the speech of 49er or from the order of the Board finding 49er's speech "good cause" for revoking 49er's California vehicle license to sell new Chevrolet products.

California Vehicle Code (CVC) § 3061 provides:

> "In determining whether good cause has been established for modifying, replacing, terminating, or refusing to continue a franchise, the board shall take into consideration the existing circumstances, including, but not limited to . . . "

The California Legislature gave the Board the authority to establish other than the seven listed standards when it required review of the seven listed standards but ended the required review with "but not limited to. . . ".

In *Hamilton v. University of California* (1934) 293 U.S. 245, 257, 258, this Court held that orders of state agencies are considered statutes under 28 U.S.C. § 1257(2).

In this proceeding, the Board's act of establishing a "good cause" standard, one not expressly found in CVC § 3061, was state action. When this new standard adopted by the Board was applied to 49er's protected speech, this was also state action and is reviewable on appeal by this Court.

This Court held in *Williams v. Bruffy* 96 U.S. 176, 183:

> "Any enactment, from whatever source originating, to which a State gives the force of law is a statute of the State, within the meaning of the clause cited relating to the jurisdiction of this court."

II

THE INADEQUATE SALES ISSUE WAS PLACED AT ISSUE BY GENERAL MOTORS IN THE SECOND HEARING AFTER THEY LOST THE FIRST HEARING BASED ON THE RECORD WHERE 49ER'S EXPRESSION WAS ADMITTEDLY GM'S SOLE REASON FOR TERMINATION

As 49er pointed out at Page 12 (Jur.St.) *Reinders Brothers, Inc. v. Rain Bird Eastern Sales Corporation* (1980) 627 F.2d 44 establishes the standard for intent and timing of reasons for franchise termination.

Mr. Cook's termination letter of October 23, 1979, lists only 49er's complaints in regard to Chevrolet's conduct within the franchise relationship.

As a *fortiori,* the statement of Mr. Cook under cross examination in the first hearing stated 49er's termination had nothing to do with the performance of the dealership in the marketplace (Appendix G, P. A-41, A-42) which was, in fact, very satisfactory when the termination letter was sent in 1979. Mr. Cook specifically stated 49er's expression about Chevrolet was the sole reason for termination.

Counsel for GM foresaw the First Amendment issue, after the first hearing, and inserted a reduction in car sales as an additional reason in the second termination letter in an attempt to prevent First Amendment review.

III

THE "GOOD CAUSE" STANDARD ADOPTED BY THE STATE OF CALIFORNIA VIOLATES THE STANDARDS ESTABLISHED BY THIS COURT FOR FIRST AMENDMENT EXPRESSION IN COMMERCIAL FREE SPEECH AREAS OF BUSINESS RELATIONS

49er made a strong and concerted effort to effect change in GM's policies that were unfair and illegal. It is true that 49er communicated its displeasure to the government and GM. 49er's efforts did not exceed the standards of persuasion approved for automobile manufacturers when attempting to persuade dealers to its way of thinking. In *Bob Maxfield, Inc. v. Amercian Motors Corp.* (1981) 637 F.2d 1033, 1037 the court held:

> "A manufacturer may use strong persuasion, encouragement, or cajolery to the point of obnoxiousness to induce his retailer to buy its full line of products."

The key to GM's real concern can be found at Page 14, Motion to Dismiss, where the fear that other dealers would follow 49er's expression of dissatisfaction with GM's policies that could bring GM's business to a standstill. At least to a standstill until proper changes could be instituted by GM.[3]

GM and the State of California contend at Page 15, Motion to Dismiss, that even though the First Amendment "might" apply, the State was free to adopt "good cause" standards that would allow franchise termination by one of the largest corporations in the world against a small franchisee who objected to the manner in which the giant did business. Even though this meant violating the First Amendment rights of that franchisee.

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[3] On examination of Mr. Cook, a question was asked with regard to Mr. Wilmshurst's election to the Chevrolet Dealer Council. Mr. Cook answered that Mr. Wilmshurst was elected to represent his fellow dealers by his peers or other dealers. It is obvious that Chevrolet was concerned by the fact that Mr. Wilmshurst's ideas were embraced by other Chevrolet dealers so much so that he was elected to the Council by them. (Appendix G, P. A-42)

In *Organization For A Better Austin v. Keefe* (1971) 402 U.S. 415 this Court held, even if speech was intended to have a coercive impact, it is not removed from First Amendment protection. As a further standard, the Court found that one party may find offensive another party's comments on their conduct, however, so long as the means are peaceful, the communication need not meet standards of acceptability.

At GM's suggestion, the Board adopted a standard for 49er's speech. At Page 15, Motion to Dismiss, GM refers to the standard of speech that is "illegitimate, unjustified, inexcusable and coercive" and makes the "continuation of the business relationship impossible." A standard of this type was struck down in *Cohen v. California* (1971) 403 U.S. 15.

The cases cited by GM and adopted by the State of California do not apply to the circumstances or relationship of the parties in this proceeding.[4]

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[4] *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508 does not apply to a franchisor/franchisee relationship and holds that First Amendment rights are not immunized from regulation when an integral part of the conduct violates a valid statute. That is not the case here. The holding in *Connick v. Myers,* 461 U.S. 138 would apply only to an employee/employer relationship. In the franchisor/franchisee relationship the franchisee is an independent, commercial business and is not subject to the restraints and duties of an employee.

CONCLUSION

Beyond question, this case raises substantial national issues of first impression involving not only fundamental constitutional rights of appellant, but also of numerous other similarly situated franchisees whose petitions to the government and complaints to their respective franchisors have not been heard due to the "chilling effect" of potential franchise cancellation. The Court should deny the motion to dismiss, note probable jurisdiction, and grant plenary consideration of this appeal.

Dated: October 31, 1985

Respectfully submitted,

RICHARD E. WILMSHURST
Appellant, pro se

(Appendix G follows)

Appendix G

HEARING
STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD
Protest No. PR-271-80
In the Matter of the Protest of:
49ER CHEVROLET,
Protestant,
vs.
CHEVROLET MOTOR DIVISION
GENERAL MOTORS CORPORATION,
Respondent.
1401 21st Street
Sacramento, California
VOLUME V
Thursday, September 4, 1980

Excerpts of the Cross Examination of Robert E. Cook, Vice President of the General Motors Corporation at page 719 and 720

Wendy E. Stewart
C.S.R. No. 4355

MR. ROSCH: Assumes a fact not in evidence, namely that there was a positive side to the relationship. I'll object on that ground.

ADMINISTRATIVE LAW JUDGE SKROCKI: Why don't you lay some foundation. Was there anything positive about the relationship between 49er Chevrolet and Chevrolet Motor Division?

THE WITNESS: Not the business relationship.

ADMINISTRATIVE LAW JUDGE SKROCKI: *Was there anything positive about the job that Mr. Wilmshurst through 49er Chevrolet was doing for the Chevrolet Motor Division?*

THE WITNESS: *Yes. The performance of that dealership in the marketplace is very satisfactory.* (Emphasis added)

MR. HEISER: Q. Wouldn't you consider that a positive side of the relationship?

ADMINISTRATIVE LAW JUDGE SKROCKI: I'm sorry. Had you finished your response, sir?

THE WITNESS: No. That was all I was going to say about that. I'm sorry, Mr. Heiser.

MR. HEISER: Q. I asked you whether you would consider that a positive side of the relationship.

A. It would be so minimal in being weighted against the other aspects of it that it doesn't count at all. The issue that we were addressing was not Mr. Wilmshurst's performance in the marketplace. It was the items that I mentioned earlier,

and I guess I'd have to say in all honesty that if he were doing twice or three times the job he's doing now, we still would not wish to continue to do business with him.

ADMINISTRATIVE LAW JUDGE SKROCKI: You were asked whether you sent a letter of congratulations when Mr. Wilmshurst was appointed to the Dealers Council. Are dealers appointed or are they elected?

THE WITNESS: They are elected by their peers, by other dealers.

ADMINISTRATIVE LAW JUDGE SKROCKI: They are not appointed by Chevrolet Motor Division?

THE WITNESS: No.

MR. HEISER: Thank you for that clarification, your Honor.

Q. So, in other words, you did not take into consideration the dealership's performance in making your decision.

A. It was noted. It was noted in the deliberations. *As I said, it's inconceivable to imagine a better job that he could do that would prompt us to want to do business with him.*

Q. You indicated that another factor was that he, I think, demanded deviations from your rules, the way you do things. Is that correct?

A. Yes.

Q. What deviations was he demanding?